Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

MAY TERM, 1977

* * *

NO. 76-1275

* * *

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

RICHARD DONALD GILL,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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W. J. ESTELLE, JR., DIRECTOR,
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V.

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* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 10, 1977, in the above entitled cause.

OPINION BELOW

The opinion delivered by the Court of Appeals denying Petitioner Estelle's Petition for Rehearing and Petition for Rehearing En Banc is reported as *Gill v. Estelle*, 544 F. 2d 1336 (5th Cir. 1977); a copy is attached to this petition as Appendix "A".

The opinion delivered by the Court of Appeals

reversing and remanding this cause is reported as *Gill v. Estelle*, 530 F.2d 1152 (5th Cir. 1976); a copy is attached to this petition as Appendix "B". A stay of mandate was granted by the United States Court of Appeals to and including March 7, 1977.

Also attached as Appendix "C" is a copy of the opinion of the Court of Criminal Appeals of Texas affirming Respondent's conviction.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on January 10, 1977. (See Appendix "A"). A copy of the judgment is attached hereto as Appendix "D".

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether there is a constitutional requirement for counsel at a Texas defendant's probation revocation where that defendant has previously been sentenced with counsel present, as required by Texas law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

> witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides in part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

Article 781d, Section 1(b), Texas Code of Criminal Procedure, Adult Probation and Parole Law of 1957, provides:

> " 'Probation' shall mean the release of the convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition or execution of sentence is suspended."

Article 781d, Section 8, Texas Code of Criminal Procedure, Adult Probation and Parole Law of 1957, provides in part:

> ". . . . The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation."

STATEMENT OF THE CASE

Gill was convicted in the 180th Judicial District Court of Potter County, Texas, for the offense of robbery by assault. Gill pled not guilty, was found to be guilty by the jury, and was assessed punishment at twenty-five years in the Texas Department of Corrections. The said judgment and sentence was appealed to the Court of

Criminal Appeals of Texas, and said judgment and conviction was affirmed in an opinion delivered on April 18, 1972, styled *Gill v. State*, 479 S.W.2d 289 (Tex. Crim. 1972).

Respondent filed his application for writ of habeas corpus in the United States District Court for the Northern District of Texas, Amarillo Division, and on December 31, 1974, the District Court denied relief and dismissed Gill's application. Gill appealed this decision to the United States Court of Appeals, and on April 28, 1976, the Fifth Circuit reversed and remanded the holding of the United States District Court. The state subsequently filed Petition for Rehearing and Petition for Rehearing En Banc, and the Fifth Circuit denied such petition on January 10, 1977.

REASONS FOR GRANTING THE WRIT

The Writ Should Be Granted To Correct The Reliance Of The Fifth Circuit Upon Mempa v. Rhay, 389 U.S. 128 (1967) In Light Of The Holding In Gagnon v. Scarpelli, 411 U.S. 778 (1973) And Article 781d Of The Former Code Of Criminal Procedure of Texas.

Gill has complained in his application for writ of habeas corpus that at the punishment stage of his robbery conviction, the prosecutor introduced a prior conviction for which Gill had had his probation revoked without counsel. Gill contends that the use of the counselless probation revocation during the punishment stage of his trial, deprived him of due process and equal protection under the progeny of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Gill had been convicted in Texas of robbery by assault in 1961 and given a probated sentence. In 1962, his

probation was revoked at a proceeding at which he was not represented by counsel. The Fifth Circuit found that counsel was a constitutional necessity at a probation revocation proceeding, relying on *Mempa v. Rhay*, 389 U.S. 128 (1967). Respondent asserts that this holding ignores the subsequent decision of this Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The decision of the Fifth Circuit states emphatically that "constitutional law clearly requires that counsel be afforded to a defendant in a probation revocation proceeding." *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). (Gill v. Estelle, 530 F.2d 1152 (5th Cir. 1976).

A holding of this Court subsequent to *Mempa v. Rhay* has established that counsel need not be afforded to a defendant at a revocation proceeding if state law requires that the petitioner be sentenced at the time of trial, rather than at the time his probation is revoked:

> "Two prior decisions set the bounds of our present inquiry. In *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,' *id.*, at 123, 88 S.Ct., at 257, and that sentencing is one such stage, the court concluded that counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case

such as the present one, where the probationer was sentenced at the time of trial. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973)."

The *Mempa* decision was based on the law of Washington which required sentencing at the time probation was revoked rather than at the conclusion of trial. Under Washington law, a prisoner could not appeal while on probation.

The law in effect in Texas at the time of Respondent Gill's conviction required that *sentence be imposed at time of trial*:

" 'Probation' shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition or execution of sentence is suspended. Article 781d, Sec. 1(b), T.C.C.P., Adult Probation and Parole Law of 1957."

The prisioner Gill, under Texas law at the time of his trial in 1961, could have appealed the imposition of sentence upon him at the time he was placed on probation. However, he could not have appealed had he waited until probation was revoked for the period of time in which to give notice of appeal would have expired.

"The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. Article 781d, Section 8, T.C.C.P., Adult Probation and Parole Law of 1957."

The Fifth Circuit draws a distinction between a

conviction and a probation revocation. This distinction is meaningful only in states such as Washington, from which *Mempa* arose, wherein sentence is not imposed until the probation revocation hearing. In Texas, however, the probationer is sentenced at the time of trial and has, at that time, a conviction that is appealable to the Court of Criminal Appeals of Texas.

Petitioner asserts, therefore, that the Fifth Circuit's reliance upon *Mempa* for the proposition that constitutional law clearly requires that counsel be afforded to a defendant in a probation revocation proceeding is misplaced in light of the subsequent decision of this Court in *Scarpelli* and the fact that Texas law differs greatly from the law of Washington upon which *Mempa* was decided. Under Texas law, the Adult Probation and Parole Act of 1957, Gill, in 1961, was sentenced at the conclusion of his trial--a point at which Gill did have counsel--and under Texas law had the right to appeal from that sentence while he was on probation. The law in Texas at the time of Gill's probation was the same as that referred to in the *Scarpelli* decision where the probationer is sentenced at the time of trial. Petitioner contends, therefore, that there was no constitutional requirement for counsel at Gill's probation revocation hearing because Gill had already been sentenced under Texas law. The revocation of Gill's probation was not unconstitutional.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted. Petitioner prays that the holding below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, John Pierce Griffin, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Respondent by placing same in the United States mail, certified, postage prepaid, addressed as follows: Mr. Donald A. Smyth, Staff Counsel for Inmates, Texas Department of Corrections, Route 1, Box 77, Brazoria, Texas 77422, on this the 10th day of March, 1977.

JOHN PIERCE GRIFFIN
Assistant Attorney General

APPENDIX "A"

GILL V. ESTELLE

*

Richard Donald GILL,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 75-1416.

United States Court of Appeals,
Fifth Circuit.

Jan. 10, 1977.

State prisoner sought habeas corpus. The District Court for the Northern District of Texas, Halbert O. Woodward, Jr., denied relief and prisoner appealed. The Court of Appeals, Roney, Circuit Judge, 530 F.2d 1152, reversed and remanded. On state's petition for rehearing and petition for rehearing en banc, the Court of Appeals, Roney, Circuit Judge, held that the prisoner had been entitled to counsel at state hearing which not only revoked probation but also imposed sentence.

Order accordingly.

Criminal Law — 982.9(2)

Where, at time that accused entered plea of guilty,
Criminal Law — 982.9(2)

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Where, at time that accused entered plea of guilty, it was ordered that " imposition and execution of the sentence based upon the judgment of conviction herein entered against said defendant in this cause be and the same is hereby suspended," and accused was then placed on probation, and where, at the time that order revoking probation was entered, the order provided that accused "is here and now sentenced" to serve between five and eight years in the penitentiary, the revocation hearing involved both the revocation of probation and the imposition of sentence so that accused was constitutionally entitled to counsel at that hearing.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

(Opinion April 28, 1976, 5 Cir. 1976, 530 F.2d (1152)

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is a petition for rehearing and rehearing en banc filed by the State of Texas. As one ground for its petition, the State contends that the panel erred in relying on *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 LEd.2d 336 (1967), for determining the instant probation revocation proceeding to be invalid. Instead, the State asserts that *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and not *Mempa*, should control. Specific attention is directed to this statement in the panel decision:

> Constitutional law clearly requires that counsel be afforded to a defendant in a probation revocation proceeding.

Gill v. Estelle, 530 F.2d 1152, 1153 (5th Cir. 1976). We grant the petition for rehearing limited only to addressing the above argument made by the State. Otherwise the decision of the panel remains unaltered. *Gill v. Estelle, supra.*

The question here is whether Gill was entitled to be represented by counsel at his probation revocation proceeding. If so, the instant proceeding would be unconstitutional since Gill had no counsel to represent him when probation was revoked. *Mempa v. Rhay* mandates that counsel be provided an indigent at a combined revocation of probation/sentencing proceeding. There is no dispute that Gill was indigent when his probation was revoked.

The State argues that under *Ganon v. Scarpelli, supra*, Gill would have no automatic right to counsel at the probation revocation and that *Mempa* is inapposite to the instant facts. The State further argues that this case is identical to *Gagnon* where the probationer is sentenced at the time of probation although execution of that sentence is suspended. In that situation no sentence is imposed anew when probation is revoked since the sentence was first imposed at the time probation was granted.

Although the State correctly reads the prevailing law, it is mistaken that *Gagnon v. Scarpelli* should control this question. The facts in Gill's case make it identical to the problem addressed by the Supreme Court in *Mempa v. Rhay*. Although this Court's above quoted passage may be overboard as a recital of the black letter law, it is clear, however, that the Constitution would require that Gill be provided with the counsel at the revocation

proceedings under the facts of this case. We hold, therefore, that Gill's revocation of probation proceeding was constitutionally invalid. Our reasoning follows.

In *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Supreme Court held that counsel must be provided a defendant at a combined revocation of probation/sentencing hearing. The sentence in *Mempa* was imposed at the time of the probation revocation and not when probation was first granted. *See Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). The Court stated that counsel must be provided "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." 389 U.S. at 134, 88 S.Ct. at 257.

Six years later in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Court defined the limits of *Mempa*. The issue in *Gagnon* was whether a probationer was entitled to a hearing at the time of revocation and if so, whether counsel must be provided at that hearing. The Court held that hearings along the lines established for parolees in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), must be accorded a probationer. Counsel at these hearings, the Court held, is not an absolute right. Instead the right to counsel would be determined on a case-by-case basis. Importantly the Court recognized the difference with *Mempa*.

> [Under *Mempa*] counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, *where the probationer was sentenced at the time of trial.*

411 U.S. at 781, 93 S.Ct. at 1759 (emphasis added).

The State argues that *Gagnon*, and not *Mempa*, control. We disagree. The statement from the panel opinion, quoted above, although perhaps stating the law too broadly is correct under the facts of the instant case. We find it unnecessary at this time to determine whether Texas has decided to go beyond the constitutional prescriptions of *Gagnon* and apply the *Mempa* right to counsel in *all* revocation of probation proceedings. The pre-*Gagnon* case of *Ex parte Bird*, 457 S.W.2d 559 (Tex.Cr.App.1970), indicates this although the more recent decision in *Ex parte Shivers*, 501 S.W.2d 898 (Tex.Cr.App.1974), upon a close reading, indicates otherwise. On the record before us we believe Gill's revocation of probation proceeding falls into the category of cases recognized in *Mempa*.

At the time of Gill's revocation proceeding in 1962, Texas statutory law allowed a sentencing court to either suspend the imposition of sentence, or impose sentence and then suspend execution of the sentence. Tex.Code Crim. Pro. art. 781d. "Where the execution of the sentence was suspended under such procedure, the sentence was actually pronounced and imposed." *Ex parte Shivers, supra*, 501 S.W.2d at 901 n.2. Under this law, and applying *Mempa, the Texas courts held that were imposition of sentence was suspended and probationer was later sentenced at the time of the revocation, counsel must be provided when the probation was revoked. See, e.g., Ex parte Jentsch*, 510 S.W.2d 320 (Tex.Cr.App.1974); *Crawford v. State*, 453 S.W.2d 148 (Tex.Cr.App.1968); *Ex parte Williams*, 414 S.W.2d 472 (Tex.Cr.App.1967). *See also McConnell v. Rhay*, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968). Under current Texas law, the courts will only be able to suspend

imposition of the sentence when probation is granted. Tex.Code Crim.Pro. art. 42.-12(3). *See Teel v. State*, 432 S.W.2d 911 *supra*. The court's option for alternative method has not been eliminated.

The State of Texas has supplied this Court with copies of the documents granting Gill's 1961 probation and the 1962 order revoking that probation. It is the State's position that these documents indicate that Gill was actually sentenced at the time of his guilty plea in 1961 and that the execution of that sentence was thereafter suspended. Thus, it is argued, this is a *Gagnon* situation.

Gill was represented by counsel at his plea of guilty before the state court. Thereafter the court

> ORDERED AND ADJUDGED AND DECREED that the *imposition and execution* of the sentence based upon the judgment of conviction herein entered against said defendant in this cause be and the same is hereby suspended, and the said defendant is hereby placed on probation for the full number of years of his sentence to wit: Eight years

Upon violation of his conditions of probation, Gill was brought before the court in October 1962. The court's order revoking probation and sentencing indicates that Gill's sentence was first imposed at that time.

> And the defendant having waived time for appeal and agreed to accept sentence, he *is here now sentenced to serve* not less than five years and not more than eight years in the Texas State Penitentiary.

In light of what appears to be the plain language of these documents, Gill was placed on probation without having sentence first imposed. When over a year later that probation was revoked, Gill received imposition of a

sentence of imprisonment running "not less than five and not more than eight year." This was, therefore, a *Mempa v. Rhay* situation.

Two reasons further support our conclusion. First, the state sentencing court in its "Judgment Plea of Guilty Before Court" stated that Gill "shall be punished therefor by imprisonment in the penitentiary of the State of Texas for Eight (8) years . . . " This, we think, was no more than as assessment of punishment and does not overcome the plain language of the above quoted documents. The court's February 16, 1961 order granting probation supports this reading: Gill was found "guilty of the offense of Robbery by Assault by this court and that his punishment was assessed by this court at Eight years in the State Penitentiary." This conclusion of assessment of punishment—Eight years—finds further support in that at the time Gill's probation was revoked he was sentenced to serve "not less than five and not more than eight years." The judgment plea, however, refers only to a straight eight year punishment. The punishment evidence in the judgment plea of guilty is at variance with what appears in the "Order Revoking Probation, And Sentencing." Only if no sentence had been imposed at the time of probation, in light of the differing sentence of punishment appearing with the revocation order, would the later sentence not be prohibited by Texas law. There is a long line of Texas decisions holding that where a sentence was imposed and execution of sentence suspended, then upon later revocation of probation, after expiration of that court term, the sentencing court could not alter, amend or add further conditions not part of the sentence first imposed. *See, e.g., Ex parte McCarter*, 415 S.W.2d 409 (Tex.Cr.App.1967); *Ex parte Green*, 375 S.W.2d 312 (Tex.Cr.App.1964); *Ex parte Hernandez*, 364 S.W.2d 688 (Tex.Cr.App.1963); *Ex parte Downey*, 171

Tex.Cr.R.296, 350 S.W.2d 20 (1961); *Ex parte Minor*, 167 Tex.Cr.R. 170, 319 S.W.2d 114 (1959). The revocation of probation occurred in October 1962. The plea of guilty was accepted in February 1961. Unless no sentence was initially imposed this latter sentence would constitute an alteration or amendment of the first sentence.

Second, the state habeas corpus court in *Ex parte Gill*, 509 S.W.2d 357 (Tex.Cr.App.1974), found that the revocation of probation proceeding, without presence of counsel for Gill, was invalid. 509 S.W.2d 358. In its opinion the court stated that an "eight year probated sentence was *assessed*" at the time of the 1961 conviction. *Id.* at 358 (emphasis added). Later it was at "the revocation proceeding in said cause in which probation was revoked and petitioner was sentenced to eight years in the penitentiary." *Id.* at 358. We are in agreement with the determination of the Texas courts.

It follows from the above that Gill was not sentenced until his probation was revoked in 1962. He was without counsel at the time and *Mempa v. Rhay* is applicable. The revocation of probation proceeding was therefore invalid.

Finally, we delete from the panel decision the following statement: "The state does not argue otherwise." 530 F.2d at 1153. Accordingly, we adhere to our original decision in this case.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "B"

GILL v. ESTELLE

Richard Donald GILL,
Petitioner-Appellant,

v.

W. J. ESTELLE,Jr., Director, Texas Department of Corrections,
Respondent-Appelle.

No. 75-1416.

United States Court of Appeals,
Fifth Circuit.

April 28, 1976

State prisoner petitioned for writ of habeas corpus. The United States District Court for the Northern District of Texas at Amarillo, Halbert O. Woodward, J., denied relief and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that probation revocation proceeding at which petitioner was not represented by counsel was unconstitutional; and that the use of the probation revocation at sentencing phase of bifurcated trial to obtain a longer sentence for petitioner than he otherwise might have been given was unconstitutional.

Reversed and remanded with directions.

1. Criminal Law — 982.9(2)

Constitutional law requires that counsel be afforded to a defendant in a probation revocation proceeding.

2. Courts — 100(1)

Principle that a defendant has right to counsel at

probation revocation proceeding must be applied retroactively.

3. Witnesses — 345(1)

Under Texas Law, if petitioner had successfully completed probated sentence for previous conviction, the conviction could not have been used for impeachment purposes in subsequent trial.

4. Habeas Corpus — 45.2(4)

Denial of defendant's motion in limine seeking court order to prevent state's use of prior conviction for impeachment in event petitioner testified during the guilt stage of bifurcated trial did not rise to constitutional error where petitioner did not take the stand and the prior conviction was not used for impeachment.

5. Criminal Law — 986

Use of probation revocation, which had been obtained in violation of petitioner's constitutional right to counsel at probation proceeding, at sentencing stage of bifurcated trial to obtain a longer sentence for petitioner than he otherwise might have been given could not be considered harmless where prosecutor asked for and obtained a jury sentence of 25 years, and petitioner was entitled to be resentenced without consideration of the prohibited probation revocation. Vernon's Ann.C.C.P. art. 37.07, § S(a).

6. Criminal Law — 1165(1)

Under certain circumstances, the use of the product of counselless criminal proceedings can be protected under the harmless error rule.

7. Habeas Corpus — 30(3)

Petitioner did not waive constitutional objection to use of unconstitutional probation revocation at punishment stage of bifurcated trial by failing to object

to exhibit, which included the judgment granting probation, revocation judgment and sentence, when it was offered into evidence.

8. Constitutional Law — 43(1)

A deliverate waiver of a constitutional right is normally required.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Richard Donald Gill asserts two constitutional errors in his Texas robbery conviction in the prosecution's use of a prior conviction and an ensuing counselless probation revocation. Specifically, Gill asserts that he was effectively prevented from testifying in his own behalf because the court refused to grant a preliminary motion to prevent the state from using the prior conviction for impeachment purposes; and, he contends that the use of the counselless probation revocation during the punishment stage of his trial deprived him of due process and equal protection under the progeny of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 Ed.2d 799 (1963). We reverse the district court's denial of habeas corpus relief on the ground that the probation was unconstitutionally revoked, and the use of the revocation at the punishment stage of Gill's trial violated his constitutional rights.

[1,2] Gill was convicted in Texas of robbery by assault in 1961 and given a probated sentence. In 1962, his probation was revoked at a proceeding in which he was not represented by counsel. Constitutional law clearly requires that counsel be afforded to a defendant in a

probation revocation proceeding. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). *See Ex Parte Shivers*, 501 S.W.2d 898 (Tex.Cr.App.1973). This principle established in *Mempa* must be applied retroactively. *McConnell v. Rhay*, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968). Thus, the revocation of Gill's probation was unconstitutional. The state does not argue otherwise.

Thereafter, in 1970, Gill was again convicted of robbery by assault. This conviction and resulting 25 year sentence is under collateral attach in this proceeding.

At the 1970 trial, Gill made a motion *in limine* seeking a court order to prevent the state's use of the prior conviction for impeachment in the event that Gill testified during the guilt stage of the bifurcated trial. The motion was denied.

[3] The district court was in error in concluding, on the magistrate's report, that the 1961 conviction would have been available for impeachment purposes regardless of the sentence. Under Texas law, if Gill had successfully completed his 1961 probated sentence, the conviction could not have been used for impeachment purposes in a Texas court. Vernon's Tex.Code of Crim.Pro. Art. 38.29. *See, e. g., Burson v. State*, 511 S.W.2d 948, 950 (Tex.Cr.App.1974); *Nichols v. State*, 494 S.W.2d 830, 834 (Tex.Cr.App.1973); *Goad v. State*, 464 S.W.2d 129, 133 (Tex.Cr.App.1971); *Smith v. State*, 455 S.W.2d 282, 283 (Tex.Cr.App.1970). Since the probation was unconstitutionally revoked, it could be argued that the revocation was void and Gill should be treated by Texas as if he had successfully completed his probated sentence, the original time for probation having expired. We need not decide this question, however.

[4] In this case, only a motion *in limine* was denied. No reasons were given. Gill did not take the stand. The prior conviction was not used for impeachment. We do not know how the court would have ruled had Gill taken the stand and the state sought to impeach him. Gill made a decision not to take the stand so the constitutional problem never arose. In this posture, Gill's complaint does not rise to a constitutional level.

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow . . .. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compeling the election impairs to an appreciable extent any of the policies behind the right involved.

McGautha v. California, 402 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed.2d 711, 729 (1971).

The use of the revocation of probation as evidence at the punishment stage of the trial, however, does reach constitutional proportions. The state and the district court mistakenly rely on *Gutierrez v. Estelle*, 474 F.2d 899 (5th Cir. 1973) and *Mays v. Estelle*, 505 F.2d 116 (5th Cir. 1974). *Gutierrez* involved the Texas habitual criminal statute, counselless sentencing and the prohibition against using probated sentences for mandatory sentence enhancement purposes. We have recently dealt at length with the nuances of this law *vis a vis* collateral attacks in *Davis v. Estelle*, 529 F.2d 437 (5th Cir. 1976) [1976]. This case does not involve the Texas enhancement statute, Gill's indictment having been modified either by court order or by the state prior to trial to exclude the enhancement court.

In *Mays v. Estelle* we held that a constitutional deficiency as to a probation revocation could not effect the admissibility of the conviction to establish the defendant's criminal record at the time of sentencing. The case rested on the Texas law that even a probated sentence may be used for this purpose. Vernon's Tex.Code of Crim. Pro. Art. 37.07(3)(a). Texas courts having construed this to include both successful and unsuccessful probations. *See Gains v. State*, 479 S.W.2d 678, 679 (Tex.Cr.App.1972); *Perry v. State*, 464 S.W.2d 660, 663 (Tex.Cr.App.), *cert. denied*, 404 U.S. 953, 92 S.Ct. 324, 30 L.Ed.2d 270 (1971); *Glenn v. State*, 442 S.W.2d 360, 362 (Tex.Cr.App.1969). Therefore, it making no difference whether the sentence was probated or unprobated, the unconstitutional revocation of probation could not cause constitutional error in considering the conviction at the punishment stage of a bifurcated trial. 505 F.2d at 118.

[5] But in *Mays*, the *conviction* was used. In this case, the *probation revocation* was used and in a very telling way. The prosecutor argued to the jury that Gill had been givin his chance, that he "blew" it, and that he now should be put away for a long time. Excerpts from the argument are illustrative:

> I don't think we have failed in our penal system, and I don't think we have failed Richard Don Gill; I think he failed society when he didn't make probation chance he had originally.
>
> He has his one chance; he blew that.
>
> And he went to the penitentiary and got a second chance when they let him out of there to live a good life, and he blew that.
>
> * * * * * *

> The defendant, if you give him a long number of years as the defense says, you are saying that the man is beyond rehabilitation.
>
> Ladies and gentlemen, Richard Don Gill in October '61 or '62 was placed on probation. That was his first.
>
> He did not make probation; he was sent to the penitentiary. He got out of the penitentiary; he came back to Amarillo, he pulled another strong armed robbery, and I submit to you that Richard Don Gill is past rehabilitation and does deserve a long term.

The difficulty with this line of argument is simply that the fact that Gill "blew" his probation opportunity was decided in an unconstitutional proceeding. The very revocation that the prosecutor so dramatically used was illegally obtained. Had only the fact of the underlying conviction been used against Gill, we would be bound by *Mays* to affirm the denial of a writ of habeas corpus. But where the unconstitutional probation proceeding itself was used specifically to obtain a longer sentence for Gill than he otherwise might have been given, the petitioner is entitled to be resentenced with out consideration of the prohibited probation revocation. *See United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Barnes v. Estelle*, 518 F.2d 182 (5th Cir. 1975); *Davis v. Wainwright*, 462 F.2d 1354 (5th Cir. 1972); *Ex Parte Olvera*, 489 S.W.2d 586 (Tex.Cr.App.1973); *cf. Mitchell v. United States*, 482 F.2d 289, 297 (5th Cir. 1973).

[6] Under certain circumstances, the use of the product of counselless criminal proceedings can be protected under the harmless error rule. *See, e. g., Zilka v. Estelle*, 529 F.2d 388 (5th Cir. 1976) [1976]; *Webster v.*

Estelle, 505 F.2d 926 (5th Cir. 1974), *cert. denied*, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975). Here the prosecutor asked for and obtained a jury sentence of 25 years. Where the unconstitutional proceeding was directly used for the purpose of securing an increased sentence, the error cannot be harmless. *See Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975). This principle logically follows from the rule that an unconstitutional conviction cannot be used for enhancement under habitual criminal statutes. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

[7,8] The Texas court held that Gill waived his rights by failing to object to Exhibit No. 3, which included the judgment granting probation, revocation judgment and sentence, when it was offered into evidence. *Ex Parte Gill*, 509 S.W.2d 357, 359 (Tex.Cr.App.1974). However such failure might effect rights under Texas law, there was no valid waiver of the constitutional right upon which this decision turns. The Supreme Court has long recognized the special nature of waiver of constitutional rights for purposes of habeas corpus proceedings. *See, e.g., Henry v. Mississippi*, 379 U.S. 443, 452, 85 S.Ct. 564, 569, 13 L.Ed.2d 408, 415 (1965); *Fay v. Noia*, 372 U.S. 391, 438-440, 83 S.Ct. 822, 848-849, 9 L.Ed.2d 837, 868-870 (1963); *Townsend v. Sain*, 372 U.S. 293, 311-312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). A deliberate waiver is normally required, and it does not appear that petitioner acquiesced in "[a]n intentional relinquishment or abandonment of a known right or privilege." *Black v. Beto*, 382 F.2d 758, 760 (5th Cir. 1967), *quoting Johnson v. Zerbst, supra*, 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466. Petitioner objected to Exhibit No. 3 on other grounds and we do not think that he waived a constitutional objection to the use of the revoked probation.

We reverse and remand to the district court with directions that the state be given a reasonable amount of time to resentence Gill according to procedures allowed by Texas law, absent which Gill must be released.

REVERSED AND REMANDED WITH DIRECTIONS.

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APPENDIX "C"

The State, in its brief, concedes that the magazine in question is just as described in Hunt v. State, 475 S.W.2d 935 (Tex.Cr.App.1972), except that all the poses are of a woman, alone, and under the holding in Hunt v. State, supra, is not constitutionally obscene.

Since it is conceded by the State that the magazine is not constitutionally obscene and since the magazine is not before this Court for it to make its own independent judgment,[1] the judgment of the trial court is reversed and the cause remanded.

Richard Donald GILL,Appellant,

v.

The STATE of Texas, Appellee.

No. 44888.

Court of Criminal Appeals of Texas.

April 19, 1972.

Defendant was convicted in 108th District Court, Potter County, Mary Lou Robinson, Jr., of robbery by assault and he appealed. The Court of Criminal Appeals, Davis, Jr., held that the court did not err in allowing questioning of victim regarding photographs of robber, admitting testimony of police officer regarding victin's description of robber and in disallowing alibi testimony that witness saw person resembling defendant.

Affirmed.

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[1]Manual Enterprises v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962). 479 S.W.2d—19

1. Criminal Law — 369(2)

Questioning of victim in regard to trip to police station to look for photograph of person who robbed her was permissible in absence of showing that photograph came from photographs of known law violators or that victim learned of defendant's criminal activity at police station.

2. Criminal Law — 1044

In absence of motion for mistrial, defendant in robbery prosecution was in no position to complain of police officer's testimony, to which trial court sustained objection, that victim identified photograph of defendant as robber.

3. Criminal Law — 1036(5)

Defendant's failure to object to hearsay statements in testimony of police officer regarding victim's identification of defendant precluded review.

4. Criminal Law — 1120(1)

Where defendant's objection to photograph picked out by victim at police station was sustained and no further relief was requested, nothing was presented for review.

5. Witnesses — 395

Where defendant had shown that victim had given description of robber at variance with testimony, police officer's testimony regarding description of robber given at police station the day after robbery was properly admitted.

6. Criminal Law — 1044

Where defendant's objection to admissibility of answer by alibi witness that he had been convicted of aggravated assault was sustained and jury was instructed to disregard the answer and answer was stricken from record but defendant made no motion for mistrial, nothing was presented for review.

7. Witnesses — 337(5)

Defendant who make no showing of indigency could not preclude use of prior felony conviction to impeach his testimony, if he took stand, on theory that prior felony conviction was void because of lack of counsel at revocation of probation proceeding.

8. Criminal Law — 358

Testimony of alibi witness that she saw person who resembled defendant at bar at some indefinite date after defendant's arrest was inadmissible where there was no evidence connecting the person with robbery, and defendant's argument regarding testimony was therefore without basis.

9. Criminal Law —857(2)

Where there was discussion by jury at punsihment phase of trial that if defendant were a model prisoner he would be released in ten years but there was no showing that the discussion influenced juror to vote for higher or lower penalty and no juror professed to know parole law and made a misstatement of it, there was no jury misconduct.

——*——

Walter L. Knapp, Amarillo, for appellant.

Tom Curtis, Dist. Atty., Kerry Knorpp, F. G. Shackelford, Asst. Dist. Attys., Amarillo, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

DAVIS, Commissioner.

This is an appeal from a conviction for robbery by assault. Punishment was assessed by the jury at twenty-five years.

The record reflects that Mrs. Billie Mae Daniel identified appellant as the person who, on April 16, 1970, entered the Toot'n Totum Store No. 21, in Amarillo, where she was employed, exhibited a pistol and said, "This is a stick-up." Witness Daniel further testified, as a result of appellant's actions, she was placed in fear of life and bodily injury and gave appellant $82.70 out of the store's cash drawer.

[1] At the outset, appellant contends that the court erred in "permitting a line of questioning regarding the injured party's trip to the Amarillo Police Station to look for the picture of the person who robbed her."

There is no complaint that the in-court identification of appellant, by Mrs. Daniel, was prompted or suggested by any picture seen at the station. On the contrary, appellant urges the only reason this line of questioning was pursued by the State was to impress upon the jurors that appellant had a police record. Appellant relies on Priest v. State, 162 Tex.Cr.R. 66, 282 S.W.2d 390. In Priest, the injured party, upon being asked if police showed him anything when he made the report, answered, "Mr. Lord (policeman) showed me a file of known pickpockets;" and further, "Officer Lord

showed me the police files on Margaret Priest (appellant) and I identified a picture of her." In addition, the witness was asked if he examined a number of photographs in the presence of Officer Lord. The State argued to the jury, "After talking there to T. T. Lord (policeman) he learned the true identity of Margaret Priest." This Court said the argument and inquiries by the State implied that the appellant was a known pick-pocket and notwithstanding the court's rulings and instructions, the jury could not wholly disregard same. This Court further noted that the effect of these matters on the jury was evidenced by the maximum penalty being assessed.

In the instant case, Mrs. Daniel testified she went to the police station the day following the robbery to look at some pictures, and upon being asked "Did you pick a photo of the person that you said did it?", an objection to the question was made and sustained. The witness further testified she saw seventy-five pictures and an objection to this testimony was sustained. The affirmative answer of the witness to a question about Exhibit One being the picture she picked out at the police state was not objected to. An objection to the introduction of the picture was sustained. Unlike the Priest case, there is an absence of any showing that the picture came from pictures of known violators of any law and there was no argument that implied that the witness learned of appellant's criminal activity at the police station.

We preceive no error.

[2,3] Appellant contends the trial court was in error in admitting hearsay statements made at the police station. The only objection made by appellant was to the testimony of Officer Bartlett, "When she fould this picture she says, 'Here he is; here is the man who robbed

me.' " An objection to this testimony that it was hearsay was sustained and appellant's request that the jury not consider same was granted. Appellant contends that the court should have granted a mistrial. Since no motion for mistrial was made, the appellant is in no position to complain. Mahaffey v. State, Tex.Cr.App., 471 S.W.2d 801; Hoover v. State, Tex.Cr.App., 449 S.W.2d 60. Appellant cites the court to the testimony of Officer Bartlett generally as being in violation of the hearsay rule. If there were other hearsay statements in the testimony of Officer Bartlett, appellant's failure to objection to the same precludes review by this Court. Grant v. State, Tex.Cr.App., 472 S.W.2d 531; Verrett v. State, Tex.Cr.App., 470 S.W.2d 883.

[4] Appellant contends that the court should have granted a mistrial when the State offered a picture into evidence as the one picked out by Mrs. Daniel at the police station.

An objection to the introduction of the picture was sustained. No further relief was requested and nothing is presented for review. Grant v. State, supra; Verrett v. State, supra.

[5] The appellant contends that the court erred in overruling his objection to the testimony regarding description of robber given at the police station out of the presence and hearing of appellant.

Officer Bartlett testified that Mrs. Daniel gave him a description of the robber and that it was basically the same description she had given the night before other than the addition that the robber's skin was rough and she couldn't determine whether or not it was pimples, scars, or what the roughness was.

In Ramos v. State, 141 Tex.Cr.R. 126, 147 S.W.2d 809,

it was said: "The State could not bolster up the testimony of the prosecutrix . . . by what she said to the officers, unless the defendant had first shown that she made statements after the alleged occurrence at variance with her testimony relative to the identification of appellant." On direct examination, Mrs. Daniel had testified that she told Officer Bartlett the next day (following the robbery) that the robber had a rough face. On cross-examination of Mrs. Daniel, the following occurred:

> "Q Right now I am asking you, did you tell the police anything else about the description of this man other than what you just told us?"
>
> The witness (Mrs. Daniel): "Well, that was at the time. No, sir, had medium complexion, I said, too.
>
> "Q What?
>
> "A Medium complexion.
>
> "Q Medium complexion.
>
> "A Yes sir."

The appellant, having shown that Mrs. Daniel had given a description at the time in question at variance with the one given the officer the next day, brings this testimony within the exception set forth in Ramos v. State, supra.

No error is shown.

[6] The appellant contends that the court erred in not declaring a mistrial when the State asked appellant's alibi witness if he had been convicted of a misdemeanor involving moral turpitude.

The record reflects that after the witness Potts had

testified that he had been convicted of aggravated assault in response to State's question, "... have you ever been convicted of a misdemeanor involving moral turpitude?", (Objection to question had been overruled by court), an objection was made to the admission of the answer; it was sustained, the jury was instructed to disregard the same and the court ordered it stricken from the record all in accordance with appellant's requests. No motion for mistrial was made by appellant and nothing is presented for review. Mahaffey v. State, supra; Hoover v. State, supra.

[7] Appellant contends that the court erred in refusing to grant his motion in limine to prohibit the State from attempting to impeach appellant should he take the stand in his own behalf.

Appellant's motion in limine alleged that he had been previously convicted of a felony and that such conviction was void in that he did not have counsel when probation growing out of such conviction was revoked.

Appellant relies on Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319. In Walling v. State, Tex.Cr.App., 437 S.W.2d 563, this Court said: "We have only recently held that for one to secure a favorable ruling under Burgett v. Texas ...., it is necessary that a showing of indigency be made. Johnson v. State, Tex.Cr.App., 432 S.W.2d 98." See also Martinez v. State, 469 S.W.2d 185; Martin v. State, Tex.Cr.App., 463 S.W.2d 449. The appellant testified at the punishment phase of the trial that he did not have an attorney when his probation was revoked but no showing of indigency was made. Further, he does not claim that he had counsel and was deprived of his services.

No error is shown.

[8] In his next two contentions, appellant complains of the court's failure to admit certain testimony of appellant's witness Durham relative to seeing another person who looked like appellant and by refusing to allow appellant to argue such testimony.

An acquaintance of appellant, Mary Judy Durham, testified she was in "Micky Finns Bar" sometime after appellant was arrested when, "There was a guy, was, looked like Rickie (appellant) or younger, and would pass for him, walked in. . . . . ." An objection to this testimony was sustained.

Appellant urges that this testimony was important to his defense of alibi.

We preceive no error in the court refusing to allow testimony of a witness that she saw a person who looked like appellant at some indefinite date after appeliant's arrest where there was no evidence connecting such person with the offense. The court having sustained the objection to the testimony, argument regarding same was properly disallowed.

[9] Appellant contends the court erred in refusing to grant a new trial because of jury misconduct.

An affidavit by juror Slay attached to appellant's motion for new trial reflects that, on the first vote at the punishment phase of the trial, the range of punishment voted for was from five years to life; that there was discussion that if appellant were a model prisoner he would be released in ten years and that he was persuaded to vote for twenty-five years with the understanding that appellant would be released in ten years.

Juror Slay's affidavit does not reflect whether the discussion influenced him to vote for a higher or lower

penalty.

There is no showing in the affidavit that a juror professed to know the parole law and made a misstatement of same. Johnson v. State, Tex.Cr.App., 418 S.W.2d 834. See also Jones v. State, Tex.Cr.App., 462 S.W.2d 578. We perceive no error.

The judgment is affirmed.

Opinion approved by the Court.

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1975

NO. **75-1416**

D. C. DOCKET NO. **CA2-74-102**

RICHARD DONALD GILL,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the **Northern District of Texas**

Before **WISDON, CLARK AND RONEY, Circuit Judges.**

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the **Northern District of Texas, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the

same is hereby, **reversed and that this cause be and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.**

April 28, 1976

Issued as Mandate: